



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 14, 1995

Honorable Mike Driscoll  
Harris County Attorney  
1001 Preston, Suite 634  
Houston, Texas 77002-1891

Letter Opinion No. 95-083

Re: Which costs in a guardianship proceeding are payable by the county if the ward's resources are insufficient (ID# 34027)

Dear Mr. Driscoll:

You ask whether "a county [is] responsible to pay guardian fees and other costs when [the ward's estate] is insufficient to pay . . . such fees and costs." You cite first section 669(a) of the Probate Code (the "code"), which, as recently amended, provides:

Except as provided by Subsection (b), in a guardianship matter, the cost of the proceeding, including the cost of the guardian ad litem or court visitor, shall be paid out of the guardianship estate, or *if the estate is insufficient to pay for the cost of the proceeding, the cost of the proceeding shall be paid out of the county treasury*, and the judgment of the court shall be issued accordingly.

Act of May 27, 1995, 74th Leg., R.S., ch. 1039, § 29, 1995 Tex. Sess. Law Serv. 5145, 5158 (italics and strikeover removed from original; italics added for emphasis). Subsection (b) of section 669 provides that the applicant is to pay the cost of the proceeding if the court denies an application for guardianship based on the recommendation of a court investigator. *Id.*; see also *id.* § 24, at 5156 (adding Prob. Code § 648A) (duties of court investigator). With respect to situations where subsection (b) does not apply, however, and the guardianship estate is insufficient to pay costs, your concern is what costs are included in the "cost of the proceeding" for which the county is responsible under section 669. You note that "cost of the proceeding" is not defined in the code.

Section 669 makes clear that "the cost of the proceeding" includes guardian ad litem and court visitor costs, and the provisions specifically dealing with the appointment of guardians ad litem and court visitors also indicate that these costs are included in "the cost of the proceeding," see Prob. Code §§ 645(a) ("A guardian ad litem is entitled to reasonable compensation for services in the amount set by the court to be taxed as costs in the proceeding."), 648(e) ("A court visitor who has not expressed a willingness to serve without compensation is entitled to reasonable compensation for services in an amount set by the court and to be taxed as costs in the proceeding."). In addition, section 665A

specifically provides that if the ward's assets are insufficient, the costs of attorneys ad litem, mental health professionals, and interpreters appointed by the court shall be borne by the county. Act of May 27, 1995, 74th Leg., R.S., ch. 1039, § 28, 1995 Tex. Sess. Law Serv. 5145, 5157.

You suggest that the only costs other than those mentioned above which should be considered as part of "the cost of the proceeding" in a guardianship matter, such that the county is responsible for them under section 669 if the ward's resources are insufficient, are the kinds of "costs" referenced in section 622(a) of the code in conjunction with section 31.007, Civil Practices and Remedies Code. Section 622(a) provides that "[t]he laws regulating costs in ordinary civil cases apply to a guardianship matter unless otherwise expressly provided by . . . chapter [XIII of the Probate Code]." Section 31.007(b), Civil Practices and Remedies Code, provides:

A judge of any court may include in any order or judgment all costs, including the following:

- (1) fees of the clerk and service fees due the county;
- (2) fees of the court reporter for the original of stenographic transcripts necessarily obtained for use in the suit;
- (3) masters, interpreters, and guardians ad litem appointed pursuant to these rules and state statutes; and
- (4) such other costs and fees as may be permitted by these rules and state statutes.

You argue that, although the list of "costs" in section 31.007 is not all-inclusive, subsection (4) indicates, at least, that to be a "cost" there must be a specific rule or statute permitting it. Accordingly, you conclude that the only costs in a guardianship matter for which the county may be made responsible under section 669 of the Probate Code where the ward's estate is insufficient to itself pay such costs are (1) those for the services of a guardian ad litem under section 645; (2) those of a court visitor who has not expressed a willingness to serve without compensation under section 648; (3) those of an attorney ad litem or interpreter under section 646; (4) clerk fees, service fees, and court reporter fees under Civil Practice and Remedies Code section 31.007(b)(1) and (2); and (5) fees of masters appointed under rule or statute pursuant to Civil Practice and Remedies Code section 31.007(b)(3).

We agree that these costs should properly be considered as part of "the cost of the proceeding" under section 669, such that the county is responsible for them if the ward's resources are insufficient to pay them. In addition, as noted above, section 665A, which was added by the legislature in 1995, subsequent to the date of your request, now makes it clear that mental health professional costs are to be borne by the county in the event of the insufficiency of the ward's estate. See Act of May 27, 1995, 74th Leg., R.S., ch. 1039,

§ 28, 1995 Tex. Sess. Law Serv. 5145, 5157-58. As to what other costs should in proper circumstances be considered as part of the section 669 "cost of the proceeding," we limit ourselves here to those you specifically address in your request and brief: the fees of a guardian, as distinct from a guardian ad litem, appointed by the court; and the fees of an attorney, as distinct from an attorney ad litem.

The provisions dealing with the appointment and compensation of a guardian of the person or guardian of the estate, as distinct from a guardian ad litem, do not refer to such guardians' fees as costs "of" or "in the proceeding," and make no indication that such fees are payable from any source other than resources of the ward. Section 665(a), which authorizes calculation of the fees of a guardian of the person as a percentage of the ward's income, provides additionally that "[i]n determining whether to authorize compensation for a guardian under this section, the court shall consider the ward's monthly income from all sources and whether the ward receives medical assistance under [the state Medicaid program]"--thus allowing for the court's denying compensation to a guardian altogether. Subsection (b) of section 665 similarly authorizes calculation of fees of a guardian of the estate as a percentage of the income of the estate and of money paid therefrom, with the proviso that "[i]f the fee is an unreasonably low amount, the court may authorize reasonable compensation to a guardian . . . for services as guardian . . . of the estate." The provisions regarding guardians of estates may not, as a practical matter, be particularly relevant to the situation you ask about where the ward has few or no resources. In any case, we find no indication in the controlling provisions that the legislature contemplated that a guardian's fees were to be considered as part of "the cost of the proceeding" under section 669. As determination of the need for appointment, and the appointment, of a guardian are the immediate objectives of guardianship proceedings, we think that the legislature would have clearly indicated that guardian costs were payable by the county in the case where the ward's estate was insufficient if it had intended such, as it did with costs of services of guardians ad litem, court visitors, attorneys ad litem, interpreters, and mental health professionals.

Similarly, with regard to fees of an attorney, as distinct from those of an attorney ad litem, in view of its specificity with regard to other costs included in "the cost of the proceeding" under section 669, we think that the legislature would have expressly provided that attorney's fees were within the scope of that provision if it had so intended. We find no indication of such intent. *Cf. Nelkin v. Panzer* 833 S.W.2d 267 (Tex. App.--Houston [1st Dist.] 1992, writ dismissed w.o.j.).

**S U M M A R Y**

If the estate of a ward is insufficient, the costs in a guardianship proceeding which are the responsibility of the county include those for services of a guardian ad litem, a court visitor, an attorney ad litem, and an interpreter, as well as clerk fees, service fees, court reporter fees, fees of masters appointed under rule or statute, and costs of services of mental health professionals. The costs of the services of a guardian or an attorney, as distinct from a guardian ad litem or an attorney ad litem, are not the county's responsibility.

Yours very truly,

A handwritten signature in dark ink, appearing to read "William Walker", with a stylized, flowing script.

William Walker  
Assistant Attorney General  
Opinion Committee